

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SUSAN M. PARKER, a single woman,

Plaintiff,

v.

ALLSTATE INSURANCE COMPANY,
a foreign insurance company,

Defendant.

CASE NO. C10-5784BHS

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING DEFENDANT'S
MOTION FOR SANCTIONS

This matter comes before the Court on Defendant's ("Allstate") motion for summary judgment (Dkt. 7) and its motion for sanctions (Dkt. 10). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part Allstate's motion for summary judgment and denies its motion for sanctions as discussed herein.

I. PROCEDURAL HISTORY

On November 11, 2010, Allstate moved for summary judgment regarding Plaintiff's ("Parker") failure to cooperate. Dkt. 7. On November 29, 2010, Parker opposed the motion (Dkt. 14), and on December 3, 2010, Allstate replied (Dkt. 16).

1 On November 11, 2010, Allstate moved for sanctions under Fed. R. Civ. P. 11.
2 Dkt. 10. On November 29, 2010, Parker opposed the motion (Dkt. 13), and on December
3 3, 2010, Allstate replied (Dkt. 15).

4 II. FACTUAL BACKGROUND

5 This matter arises out of a motor vehicle accident on December 22, 2009 (Dkt. 1-
6 3), in which Parker was injured. Complaint ¶ 1. The at-fault driver was an uninsured
7 motorist (UIM). *Id.* Parker's Allstate insurance policy provided for \$50,000 in UIM
8 coverage. *Id.* ¶ 2. Parker's complaint alleges that Allstate has refused to pay the benefits
9 on her UIM claim. *Id.* ¶ 4.

10 Parker filed her UIM claim with Allstate on the date of the accident. *See*
11 Declaration of Jim Herring (Herring Decl., Dkt. 9), Ex. A (letter from Allstate dated
12 December 26, 2009, acknowledging claim). By letter dated January 28, 2010, Allstate
13 provided her with the claim forms that needed to be completed and informed her of what
14 other documentation was needed; the letter stated that these forms and other documents
15 must be submitted and complete before Parker's UIM claim could be processed. *Id.*, Ex.
16 B.

17 Allstate sent Parker several letters requesting the required forms to be returned
18 before it could process her claim. *See id.*, Ex. C (letter and accompanying forms dated
19 February 2, 2010); Ex. E. Shortly thereafter, both parties obtained legal representation
20 regarding this claim. Allstate then began sending letters to Parker's counsel (the
21 "Fullers"). *See e.g., id.*, Ex. D (letter from Allstate confirming the the Fullers'¹
22 representation of Parker and informing the Fullers of the documents required to further
23 process Parker's claim).
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27 ¹Parker is represented by the Law Firm of Fuller and Fuller, where both Mr. and Ms.
28 Fuller are attorneys. The Court, for convenience, will refer to Parker's counsel as the Fullers.

1 In a letter dated April 23, 2010, Allstate's counsel ("Leid") informed the Fullers
2 that he needed to obtain from Parker a recorded statement regarding the accident,
3 damages claimed, and medical treatment received following the accident. *Id.*, Ex. E. The
4 letter also requested that authorization forms be completed (medical and wage loss
5 information forms included with the letter). *Id.*

6 In a letter dated June 4, 2010, the Fullers wrote to Allstate representative Tony
7 Wyche ("Wyche"). The letter informed Wyche of the Fullers' representation of Parker,
8 the extent of her injuries claimed from the accident, and an accounting of her medical
9 expenses and wage loss. Herring Decl., Ex. K.

10 In a letter dated June 14, 2010, Leid informed the Fullers that it reserved the right
11 to make defenses later, should a suit arise, and that Parker was not being cooperative with
12 Allstate's investigation and handling of Parker's claim. Specifically, the letter mentioned
13 other letters Allstate had previously sent to Parker's counsel informing Parker therein of
14 the documentation that remained outstanding. Herring Decl., Ex. H. (letters dated April
15 23, 2010, May 7, 2010, and May 27, 2010). The letter also informed Parker's counsel that
16 Allstate believed that it was entitled to take an examination under oath ("EUO") of Parker
17 before processing her claim. *Id.*

18 In a letter dated June 15, 2010, Allstate acknowledged Parker's demand packages,
19 dated June 4, 2010 and June 11, 2010. Leid reminded the Fullers that Allstate still needed
20 documentation to satisfy its "[u]nrestricted medical and wage authorizations." Herring
21 Decl., Ex. I.

22 In a letter dated July 7, 2010, the Fullers wrote to Allstate claims adjuster Jim
23 Herring ("Herring"), describing Parker's accident, her wage loss, and the extent of some
24 of her injuries. Herring Decl., Ex. L. The letter also claimed that Parker had not received
25 the required "Proof of Loss" forms, which Allstate requires to be submitted. *Id.* The letter
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1 goes on to cite several statutes that the Fullers believed to be violated by Allstate's
2 handling of Parker's claim. *Id.*

3 In a letter dated July 26, 2010, Leid informed the Fullers that Allstate regarded
4 Parker to be proceeding as a first-party insured on this claim; Parker's position was that
5 their relationship was adversarial, believing that Allstate stood in the shoes of the
6 uninsured motorist. *See* Leid Decl., Ex. 1. The letter offered \$7582.00 as a final
7 settlement based upon accepting Parker's claim that the accident caused soft tissue neck
8 and back injuries. *Id.* The offer did not consider Parker's claimed knee injury. *Id.* Leid's
9 letter disputed the Fullers' position as to the validity of Allstate's requests for obtaining
10 Parker's medical records going back ten years, for purposes of determining pre-existing
11 conditions. *Id.* Leid concluded his letter by asking the Fullers to provide eight pieces of
12 documentation that Allstate believed remained outstanding before it could process
13 Parker's claim. *Id.*

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15 In a letter dated August 13, 2010, the Fullers made the following statements: (1)
16 Parker accepts Allstate's position that Parker is a first-party claimant; (2) Parker has been
17 fully cooperative; (3) the Fullers were authorized by Parker to accept Allstate's offered
18 settlement²; (4) Parker has already provided the information she has available regarding
19 her knee injury; (5) a medical authorization was included for Parker's claimed injuries –
20 this authorization contained a stricken provision that would have permitted Allstate to
21 provide Parker's medical records to third parties for purposes of evaluating Parker's
22 claims; (6) an additional UIM claim form was included with the letter; (7) Parker agrees
23 that an EUO is provided for under the policy but only upon a showing by Allstate that it
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26 ²However, the Fullers' statement as to accepting settlement on behalf of Parker
27 was ambiguous as to whether Parker intended to seek additional monies under the policy
28 for her knee injury or would be accepting this offer as a final offer to settle her total
claim.

1 has a good faith basis for requiring the EUO; and (8) a suggested date of August 20,
2 2010, for conducting the EUO was not workable. Leid Decl., Ex. 2. The letter concludes
3 by addressing the eight pieces of information requested in Leid's prior letter and stating
4 either that such information was believed by the Fullers to have already been provided or
5 that they required more information before Parker would satisfy Allstate's requests.

6 In a letter dated August 24, 2010, Leid acknowledged the August 13, 2010 letter,
7 and offered September 17, 2010, as a date for the EUO to take place or that the parties
8 could agree to a different time if the proposed date did not work. Leid Decl. Ex. 3. The
9 letter also reminded the Fullers of Allstate's position that Parker was required to submit to
10 the EUO. *Id.* The letter provided the forms still needing to be provided by Parker and
11 clarified some other requests that had been made in prior communications. *Id.* The letter
12 also renewed Allstate's offer of settlement in the amount of \$7,582. *Id.*

13 On September 7, 2010, the Fullers sent Leid a letter informing him that he had not
14 yet provided responses to the Fullers' inquiry about the requested information. The letter
15 stated that Leid had not provided an adequate basis on which to require Parker to submit
16 to an EUO. This letter requested Leid to identify the provision within the policy that
17 would require Parker to submit to the EUO. The letter concludes by stating that the
18 Fullers will "advise whether Ms. Parker will be submitting to the" EUO. Leid Decl. Ex. 4.

19 In a letter dated September 16, 2010, Leid responded to the Fullers' letter of
20 September 7, 2010, in which Leid clarified that the offer of settlement was not, and could
21 not be, accepted as a partial settlement and that the offer was a final settlement offer. The
22 letter also informed the Fullers that they had not contacted Leid's office to reschedule the
23 EUO.

24 In a letter dated September 17, 2010, the Fullers informed Leid that Allstate and/or
25 its representatives failed to appear for Parker's EUO. Parker's counsel asserted that a
26 message was left for Leid and the phone call was not returned. Leid Decl., Ex. 6.
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1 In a letter dated September 22, 2010, Leid informed the Fullers that he believed the
2 Fullers had mischaracterized the events thus far. Leid pointed out that the Fullers’
3 statement that they would “advise whether Ms. Parker will be submitting to an
4 examination” made it “clear that [they] were striking the [EUO] scheduled for September
5 17, 2010” Leid Decl., Ex. 7. Leid reaffirmed the offer of settlement and that a new
6 date for the EUO should be scheduled.

7 Allstate and Parker never agreed to a rescheduled EUO date. Instead, on
8 September 23, 2010, Parker filed suit in this matter in Thurston County Superior Court,
9 and Allstate removed the matter pursuant to this Court’s diversity jurisdiction. Allstate
10 now moves for summary judgment on the issue of failure to cooperate and for sanctions
11 stemming therefrom. Dkts. 7, 10.

12 **III. DISCUSSION**

13 **A. Summary Judgment Standard**

14 Summary judgment is proper only if the pleadings, the discovery and disclosure
15 materials on file, and any affidavits show that there is no genuine issue as to any material
16 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
17 The moving party is entitled to judgment as a matter of law when the nonmoving party
18 fails to make a sufficient showing on an essential element of a claim in the case on which
19 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
20 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
21 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
22 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
23 present specific, significant probative evidence, not simply “some metaphysical doubt”).
24 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
25 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
26 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
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1 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d
2 626, 630 (9th Cir. 1987).

3 The determination of the existence of a material fact is often a close question. The
4 Court must consider the substantive evidentiary burden that the nonmoving party must
5 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
6 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
7 issues of controversy in favor of the nonmoving party only when the facts specifically
8 attested by that party contradict facts specifically attested by the moving party. The
9 nonmoving party may not merely state that it will discredit the moving party's evidence at
10 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
11 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
12 nonspecific statements in affidavits are not sufficient, and missing facts will not be
13 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

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15 **B. Allstate's Summary Judgment Motion**

16 **1. Failure to Cooperate**

17 Allstate maintains that Parker breached the terms of her insurance policy by filing
18 this suit because Parker failed to cooperate with Allstate's investigation of her UIM
19 claim. *See* Dkt. 7. Allstate argues that Parker failed to cooperate with respect to
20 completing and submitting the required forms and requisite documentation that needed to
21 be submitted before Allstate could process her claim. Allstate further argues that Parker
22 breached the terms of her insurance policy when, instead of submitting to the EUO,
23 Parker filed suit.

24 In opposition, Parker asserts that she was cooperative in all respects and that
25 Allstate failed to conduct the EUO that it scheduled for September 17, 2010. Dkt. 14
26 (response in opposition).
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a. Failure to Provide Necessary Documentation

On summary judgment, the Court must take the facts in the light most favorable to the nonmoving party. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Here, the parties present different versions of the truth as to whether Parker was cooperative with respect to the provision of documentation for Parker's claim. Many of the letters between Leid and the Fullers suggest that either (1) the Fullers believed they had provided the necessary documents, or (2) that there was a disagreement as to what extent Parker needed to provide more documentation.

In Washington, an insured cannot recover when he/she refuses to provide material information to the insurer. *See, e.g., Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214 (1998); *see also* Dkt. 7 at 7-8 (collecting cases). The line of cases that Allstate cites for this proposition is largely unhelpful. To begin with, the holding in *Tran* requires "refusal" to cooperate on the part of the insured. The Court has not been presented with facts that Parker absolutely refused to supply information. Instead, Parker seems to have disagreed that all the information was actually required before Allstate could complete its investigation. Further, the *Tran* case, upon which Allstate relies heavily, primarily concerned an issue of fraud, which has not been presented as an issue in this case.

Additionally, Allstate contends that Parker was noncooperative because she altered a provision in the medical release form. This release, Allstate contends, would have permitted Allstate to get expert medical opinion as to the extent of Parker's claimed injuries. While it could be argued that such is an absolute refusal to cooperate, based on the current record, in the context of the facts provided by Parker, this remains a question of fact. In Leid's many letters and conversations with the Fullers this issue could have been sorted out or other terms reached that would have satisfied Parker's apparent privacy concerns.

1 Based on the foregoing, the Court cannot conclude as a matter of law that Parker
2 was uncooperative to the extent it constituted a breach of contract with respect to
3 Allstate's document requests.

4 **b. Refusal to Submit to an EUO**

5 Allstate argues that Parker breached the terms of her policy by filing suit before
6 she submitted to an EUO. Parker maintains that Allstate did not conduct the EUO.

7 Washington courts have consistently held that an insured may not recover if he/she
8 violates the terms of the policy. *See, e.g., Downie v. State Farm Fire & Cas. Co.*, 84 Wn.
9 App. 577 (1997). In *Downie*, unlike this case, the policy at issue contained an express
10 provision requiring the insured to submit to the EUO. *Id.* at 581. It is uncontroverted
11 Parker's policy does not have such an express provision.

12 However, under Washington insurance law, "an insurance regulatory statute
13 becomes part of the insurance policy." *Britton v. Safeco Ins. Co. of America*, 104 Wn.2d
14 518, 526 (citing *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d 327, 332 (1972)). RCW
15 48.18.460 is such a statute. It provides that "[i]f a person makes a claim under a policy of
16 insurance, the insurer may require that person to be examined under oath administered by
17 a person authorized by state or federal law to administer oaths." RCW 48.18.460 applies
18 to Parker's case.

19 Parker attempts to distinguish *Downie* on the basis that Downie's policy contained
20 an express provision requiring Downie to submit to the EUO, whereas Parker's policy
21 does not contain such a provision. This is a difference without distinction. Because RCW
22 48.18.460 provides that Allstate (an insurer) may require Parker (a person making a
23 claim) to submit to the EUO, Parker's policy does contain such a provision. Indeed, the
24 Fullers' August 13, 2010, letter to Leid confirms that they agree such a provision exists
25 within the contract. Although the Fullers placed a "good faith" qualifier on this EUO
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1 term, the Fullers still, at least initially, agreed that Parker would submit to the EUO, and
2 the Fullers made some attempt to schedule the EUO with Allstate.

3 However, upon review of the record – specifically the parties’ letters addressing
4 the scheduling or non-scheduling of the EUO – the Court is left unpersuaded by Parker’s
5 position that she has cooperated with respect to the EUO. To begin with, Leid provided
6 the Fullers with the relevant statute and cases on this point, the very statute and cases
7 discussed above. Thus, the Fullers were on notice of Parker’s need to submit to the EUO.

8 More significantly, the letters sent back and forth between Leid and the Fullers
9 sheds light on the level of cooperation exerted by Parker with respect to submitting to an
10 EUO. On September 7, 2010, Leid made mention of the need to schedule the EUO. On
11 September 16, 2010, Leid informed the Fullers that they had yet to hear back about the
12 scheduling of the EUO. Based on these letters, the Fullers were made fully aware that the
13 parties had not reached an understanding as to when the EUO would be conducted. This
14 fact makes the Fullers’ accusatory letter of September 17, 2010, unhelpful in establishing
15 that it was Allstate who failed to appear for the EUO. To make sure that the Fullers were
16 well aware of the need to still schedule an EUO for Parker, Leid sent yet another letter on
17 September 22, 2010, informing the Fullers as to why no EUO took place on September
18 17, 2010. For whatever reason, Parker did not reschedule the EUO and instead filed suit
19 against Allstate on September 23, 2010, just one day after receiving Leid’s letter
20 reiterating that the EUO needed to be scheduled and that Allstate believed it was the
21 Fullers who had failed to schedule a date for the EUO.

22 Based on the foregoing, taking the facts in the light most favorable to Parker, the
23 Court concludes that Parker failed to cooperate with respect to the EUO, inexplicably
24 filing suit before having the EUO. As a result, Parker breached her insurance contract.
25 This breach could constitute a release of Allstate as to its responsibilities under the policy
26 if Allstate established that it “was *actually* prejudiced by the [Parker’s] breach.” *Keith v.*
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1 *Allstate Indem. Co.*, 105 Wn. App. 251, 255 (2001); *see also Pilgrim v. State Farm Fire*
 2 *& Cas. Ins. Co.*, 89 Wn. App. 712, 725 (1997).

3 The *Pilgrim* court held that “[t]o establish prejudice, the insurer must show
 4 ‘concrete detriment . . . together with some specific harm to the insurer caused thereby.
 5 Moreover, the issue of *prejudice* from a policy breach is a question for the jury and will
 6 be presumed only in extreme cases.’” *Pilgrim*, 89 Wn. App. at 725. Allstate’s conclusory
 7 statement that it has been prejudiced as a matter of law fails to meet their burden, as set
 8 out in *Pilgrim*. *See id.* Allstate has also not shown this to be the “extreme case” where
 9 prejudice will be presumed. *See id.*

10 Therefore, while the Court concludes that Parker did not cooperate as to the EUO,
 11 whether Allstate was prejudiced by Parker’s breach remains a question of fact.


12 **2. Sanctions**

13 Allstate’s motion for sanctions under Fed. R. Civ. P. 11 is denied.

14 **IV. ORDER**

15 Therefore, it is hereby **ORDERED** that Allstate’s motion for summary judgment
 16 (Dkt. 7) is **GRANTED in part** and **DENIED in part** and Allstate’s motion for sanctions
 17 (Dkt. 10) is **DENIED**.

18 DATED this 14th day of January, 2011.

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 22 BENJAMIN H. SETTLE
 23 United States District Judge
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